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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

ROBERT D. STRATMORE,
Petitioner,

VS.

MICHAEL H. GOODBODY,
SHAREEF DANCER (U.S.A.) SYNDICATE,
DALHAM HALL STUD and ROBERT ACTON,
Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The respondents' brief emphasizes rather than repudiates the important reasons why the Petition should and must be granted.

1. THE "NO AUCTION" CLAUSES ARE PERVASIVE THROUGHOUT THE INDUSTRY AND, THEREFORE, HAVE THE CUMULATIVE EFFECT OF A SUBSTANTIAL RESTRAINT OF TRADE IN THE WHOLE THOROUGHBRED INDUSTRY

The admitted restraint, that "At no time shall any . . . nomination be sold at auction," does not differentiate between public or private auctions. Further, as stated by the District Court below, "No auction clauses are not uncommon in the thoroughbred industry." (Pet., A-24).

Consequently, unless this Court grants the Petition, it can be reasonably expected that the "no auction" clause will continue to proliferate throughout the thoroughbred industry. The pervasiveness of the restraint will necessarily impede free market forces in this industry as a whole. *See Simpson v. Union Oil Co. of California*, 377 U.S. 13, 24 (1964). Members of syndicates with the "no auction" clause will be deprived of their freedom to sell nominations when and where they please. Auction houses will be deprived of their right to compete freely with other avenues of sale, including exchanges, private agents and others. Prospective purchasers will be deprived of their opportunity to purchase in an open market characterized by free and open bidding. And the prices of nominations will be unduly impeded by the dictates and prerogatives of forces uneffected by the vigorous and unfettered determinations of auctions.

2. "NO AUCTION" CLAUSES HAVE NO REASONABLE PURPOSE OR EFFECT OTHER THAN TO FIX, PEG, STABILIZE OR INTERFERE WITH MARKET PRICES

Almost 50 years ago this Court held that "Any combination which tampers with price structure is engaged in an unlawful activity." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940). There is no question that the gathering of willing sellers and willing buyers at an auction sets a market value or price of the commodity sold. However, there is also no question that an auction combines many different and diverse considerations which create an uncertainty as to what the price of a commodity will be before the auction gavel falls. That "uncertainty" is the "market," and reflects the ultimate impact of the converging forces of supply and demand.

To specifically eliminate an auction, by contract, among many potential sellers, is to eliminate the uncertainty of that market. To compel and force potential sellers to refrain from the auction alternative, is to deprive those potential sellers and buyers from realizing the benefits of a truly uncontrolled market.

All fanciful reasons for eliminating an auction alternative among independent sellers have no purpose but to foreclose the possibility of establishing market prices.

In this case, the respondents claim that "no auction" clauses are required to secure proper mares. However, the courts below found that there were many other "selling channels" besides auctions, including exchanges, advertisements in newspapers and others. None of these offer anymore protection for proper mares than do auctions. Indeed, it can be reasonably inferred that any potential purchaser of a prized nomination would hardly be willing to use the nomination with a less than "worthy" mare.

Equally inane is the respondents' justification that other avenues of sale beside an auction are sufficient. Besides the obvious fact that one may not block a door on the ground that access may be had through the windows, it is not the providence of a combination to regiment potential sellers and decide what avenues are best for them. Indeed, there may be other avenues of sale, but they may not offer or satisfy the needs of a potential, independent seller. A "no auction" restraint upon the potential seller, coercively applied by a combination, can have no reasonable effect except to restrain price.

3. THE SALUTARY PURPOSE OF RULE 56 F.R.Civ.P. CANNOT BE ACHIEVED IF IT IS APPLIED IN A CAPRICIOUS AND ARBITRARY MANNER

Unless Rule 56 is properly applied, it is in derogation of one's Constitutional right to trial by jury. If it is properly applied, then no right is impinged because no material fact exists for a jury to decide.

To insure that the determination of this Rule is properly applied, this Court has stated fundamental standards which lower courts are mandated to follow. The most elementary standard was stated in this Court's decision in *Continental Ore v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). This Court directed that lower courts were "bound to view the evidence in the light most favorable to [the non-moving party] and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." 370 U.S. at 696.

The courts below ignored that standard completely. As noted in petitioner's petition, and sidestepped by respondents in their brief,

the courts below viewed the evidence in the light most favorable to the respondents and ignored the petitioner's evidence altogether. (Pet., pp. 6-12). Indeed, as an egregious example, Robert Clay, a member of the Shareef Dancer Syndicate Committee, testified that he objected to the auction because it was "not good for the stability of the pricing of my stallions." Not only did the courts below ignore this admission, but they disagreed with it! When petitioner proved two sales of Shareef Dancer nominations of $150,000, no guarantee, during the relevant time, the lower courts dismissed this evidence as "special circumstances"! [Even counsel for respondents, when arguing the adequacy of damages in order to defeat petitioner's motion for an injunction, admitted that the value of petitioner's nomination was "somewhere between $125,000 and $200,000"]. And, finally, the complete failure by the courts below to so much as view the "no auction" clause in the context of paragraph 13 of the Syndicate Agreement, which by its very words had no other purpose than "to fix a price" at which the nominations [and the shares] were to be sold:

> "For the benefit and protection of shareholders the value of each share and the nominations IT IS HEREBY AGREED AND DECLARED that:
>
> (a) Nominations for the first four seasons that is until after the 15th day of July 1987 (hereinafter in this clause referred to as "the said date") may be sold privately or through the syndicate secretaries *but in either event at a fee which must be approved by the Committee whose decision on this matter shall be final and binding and open to no appeal review or question.*
>
> (b) With the single exception of His Highness Sheikh Maktoum Al Maktoum who at the date hereof is the owner of ten shares any shareholder wishing to sell or dispose of his share or shares before the said date may do so only by offering it to all or any one of the remaining shareholders such offer to be in writing through the Syndicate Secretaries and *at a price fixed by the Committee* whose decision on this matter shall be final and binding and open to no appeal review or question. In the event of more than one shareholder wishing to purchase the share

> then the Committee shall decide the matter by way of ballot (entitlement to participate in the ballot being calculated by reference to the shareholder not the shareholding). In the event that no shareholder wishes to purchase the share it shall remain unsold and the holder thus bound by his obligations under this Agreement.
>
> (c) Any shareholder wishing to sell a share or a nomination after the said date may do so privately subject to the written consent first had and obtained of the Committee and the *Committee hereby reserves the right to fix a price* below which the same may not be sold.
>
> (d) At no time shall any share or nomination be sold at auction. (Emphasis Added)

On the other hand, when it came time to view the respondents' defenses, the lower courts had no problem turning arguments into proven fact: That petitioner had required the auction house to accept a minimum bid of $125,000. That this "fact" was nowhere in the record and was not true made no difference.

When the lower courts so completely abandon the standards set by this Court for rulings on motions under Rule 56, then they usurp the functions of a jury and truly deprive a litigant of its Constitutional right. Such arbitrary and capricious "findings" hardly further the purposes of Rule 56. Indeed, in such abusive situations as this, Rule 56 loses its efficacy and becomes an instrument of tyranny.

The respondents conclude their brief with the assertion that "While petitioner lost his bet, he was not the first and undoubtedly will not be the last person to lose a bet on a horse." The petitioner did not bet on a horse. Rather, he put his trust in the free enterprise system and the law. And this he must not lose, or we all do.

CONCLUSION

Petitioner respectfully submits that the Petition for Certiorari should be granted.

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Respectfully submitted,

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